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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 712

EVE B. PAHMER,

Petitioner,

v.

UNITED STATES OF AMERICA

and

EVA PAHMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on November 1, 1956.

Citations to Opinions Below

The opinion of the District Court (R. 13a-20a) is reported in 136 F. Supp. 762. The opinion of the Court of Appeals (printed in Appendix B hereto, *infra*, pp. 13-21; also R. 22-31) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on November 1, 1956 (R. 32-33). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether the action of a holder of a National Service Life Insurance policy in signing a testamentary document and leaving it to be discovered after his death constituted a valid change of beneficiary in accordance with the National Service Life Insurance Act of 1940, as amended, and the regulations of the Veterans Administration adopted thereunder.

2. Whether the court below erred in deciding, in such an instance, to "brush aside" the provisions of 38 C. F. R., Section 8.46, and give effect to the insured's "Last Will and Testament" as a valid change of beneficiary.

Statute and Regulations Involved

The statutory provision involved is Section 602(g) of the National Service Life Insurance Act of 1940 (54 Stat. 1010, as amended by Act of July 11, 1942, 56 Stat. 659, and by Act of August 1, 1946, Section 4, 60 Stat. 782; 38 U. S. C., Section 802(g)). The regulations involved are 38 C. F. R., Sections 8.46, 8.47 (1949). The pertinent parts of the statute and regulations are set forth in Appendix A hereto, pp. 11-12, *infra*.

Statement

The action, one in the nature of an interpleader, was instituted by the United States in the United States District Court for the Southern District of New York. Jurisdiction of that court was invoked under the provisions of Section 19 of the World War Veterans Act of 1924, as amended (38 U. S. C., Section 445), and Section 617 of the National Service Life Insurance Act of 1940, as amended (38 U. S. C., Section 817).

The complaint alleged that one Marcel Pahmer had been, at the time of his death on February 11, 1951, the holder of a valid and effective policy of National Service Life Insurance issued by the United States, in the amount of $10,000. His wife, Eve B. Pahmer, the petitioner here, who was named in the policy as his principal beneficiary, had filed claim for the proceeds of the policy. However, his mother, Eva Pahmer, respondent here, had also filed claim for the proceeds on the ground that the insured during his lifetime had effected a valid change of beneficiary in her favor. The Administrator of Veterans Affairs had approved an opinion rendered by the Solicitor of the Veterans Administration that the mother had not carried the burden of proof of showing that a change of beneficiary had been made in her favor, and that therefore the wife was entitled to receive the proceeds of the policy. Nevertheless, by reason of the conflicting claims, the United States, disclaiming any interest in the fund, sought a judicial determination of the respective rights of the claimants.

On cross-motions by the two defendants (the wife and the mother) for summary judgment, the wife (petitioner here) rested on her status as the named principal beneficiary at the date of death. The mother (respondent here) produced in support of her motion a handwritten document entitled "THIS IS MY LAST WILL". This document, signed but unwitnessed, was conceded to be in the handwriting of the insured, and to have been found with his body shortly after his death by suicide in a New York apartment in 1951. When found, it was enclosed in a sealed envelope bearing the handwritten inscription: "My last will and Testament—To be opened only by my mother".

The document, in form a will, contained the direction: "In case my Life Insurance is payed off after my death, the totality of it is to go to my mother, above named, for her to own and dispose of at her will, after collecting it in full".

There was no claim that at the time of his death the insured possessed any life insurance other than the policy of National Service Life Insurance in dispute. Nor was there any claim that he had at any time taken any action to change his beneficiary other than the signing and leaving of the "will".

The facts being uncontested, the matter was disposed of on the motions for summary judgment. The District Court held that the document entitled "THIS IS MY LAST WILL", even though unprobated and unprobatable,* was a testamentary instrument which did not express an intent to make a present change of beneficiary, and that even if treated as a will it could not effect a valid change. This conclusion was rested on the regulation of the Veterans Administration (38 C. F. R., Section 8.46; Appendix A, *infra*, p. 11), which provided: "A beneficiary designation, but not a change of beneficiary, may be made by last will and testament duly probated." Judgment for the full amount of the proceeds was accordingly awarded to the wife (petitioner here).

The Court of Appeals reversed, holding that the action of the insured "in signing a plain statement of his intended change of beneficiary and disposing of the writing in such a way that, as he might reasonably have expected, it would come into his mother's possession immediately upon the discovery of his suicide, was enough to accomplish the intended change" (Op., p. 19, *infra*; R. 28). The court further held that where the intention of the insured to change his beneficiary was established, the courts should, and here would, "brush aside" the prohibition of the regulation against effecting such a change by will (Op., p. 21,

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* The parties conceded and the District Court held that the "will" would not have been admissible to probate under the laws of either Florida or New York, the only two states in which it might have been claimed that the insured resided at the date of death. The Court of Appeals, expressing "no contrary view", found "the eligibility of the instrument to probate to be a question not necessary to decide" (Op., p. 16, *infra*; R. 25).

infra; R. 30). In so holding, the court expressly disagreed with and declined to follow contrary decisions in the Fifth Circuit and the Western District of South Carolina.

Reasons Relied on for the Allowance of the Writ

1. The decision of the court below is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hester* v. *Hester,* 171 F. 2d 477 (1948), and the decision of the District Court for the Western District of South Carolina in *Lane* v. *United States,* 116 F. Supp. 606 (1953). See also *Owens* v. *Owens,* 305 Ky. 460, 204 S. W. 2d 580 (1947). This conflict was recognized and made explicit by the court below in its opinion, when it categorized the decisions in the *Hester* and *Lane* cases as being "in flat conflict with the basic principle which underlies the multitude of cases holding that notice to the Veterans' Administration during the lifetime of the insured, is not essential to an effective change" (Op., p. 21, *infra*; R. 30).

The decision in *Hester* v. *Hester* (*supra*), in so far as it deals with the validity of a change of beneficiary purported to be made by will, is not, we submit, mere dictum, as characterized by the court below. In reversing a district court decision in favor of the beneficiaries of a purported change, the court declined to consider whether the change document was a valid will, on the ground that even if it were "this would not avail them, since by express provisions of regulation and policy, 'no change of beneficiary may be made by last will and testament' " (171 F. 2d at 479). The conclusion that the applicable regulation of the Veterans Administration is to be given effect, not "brushed aside", was thus essential to the disposition of the case.

On the other hand, *Woods* v. *United States,* 69 F. Supp. 760 (M. D. Ala., 1947), the sole authority on the point relied on by the court below, clearly contains in this respect no more than dictum. The court found that the insured had taken "four different, substantial steps" to manifest and effectuate his intent to change; and the court expressly

declined to pass on the question whether the making of a will alone would have been sufficient (69 F. Supp. at 763).*

Argument was advanced in the courts below on behalf of the mother (respondent here) that 38 C. F. R., Section 8.46, is by its terms applicable only to changes purported to be effected by will "duly probated", and is therefore inapplicable in the instant case, where the "will" was not probated or probatable. The decision of the court below, however, goes on no such narrow (and in our judgment untenable) ground. As in the *Hester* case (only looking in the opposite direction), the court found it unnecessary to pass on the validity of the "LAST WILL" as such, since in its view the regulation barring changes by will was ineffective. It thus faced up to a direct conflict of view with other courts which have considered the validity of a change attempted by will. We submit that this conflict should be resolved by this Court.

2. Less clearly obvious but, we believe, underlying the decision of the court below is a basic conflict with the approach in decisions in other circuits, particularly the Fifth. An often cited decision in that circuit, *Gann* v. *Meek*, 165 F. 2d 857 (C. A. 5th, 1948), certiorari denied 334 U. S. 849, established a precedent for relaxation of requirements in cases of soldiers on active duty in war areas. As in the instant case, the court, over sharp dissent by Judge Sibley, accepted as sufficient a showing of intent to change the beneficiary, without any showing of attempt by the insured in his lifetime to notify the Veterans Administration in compliance with the regulations. In the Fifth Circuit itself the court has since drawn away from *Gann* v. *Meek;* in *Butler* v. *Butler*, 177 F. 2d 471 (1949), the

* *Zabor* v. *United States*, 113 F. Supp. 287 (W. D. N. Y., 1953), affirmed on opinion below *sub nom. Zabor* v. *Siejak*, 212 F. 2d 440 (C. A. 2d, 1954), given the benefit of a "see also" citation by the court below, is likewise a case where positive evidence of a validly effected change was permitted to be *supplemented* by a will as evidence of intent.

court expressed itself as "unwilling to extend the *Gann* case beyond its particular facts" (p. 472); and in *Kell* v. *United States,* 202 F. 2d 143, 144 (1953), the court adopted with approval a lower court opinion which had in terms rejected the majority decision in *Gann* v. *Meek* and accepted as authority Judge Sibley's dissent.

Although the court below in the instant case does not cite *Gann* v. *Meek* in its opinion, its criticisms (Op., p. 20, *infra*; R. 29) of *Butler* v. *Butler* and of *Hester* v. *Hester,* 171 F. 2d 477, as involving unduly technical application of the regulations, suggest that it adheres to a view now followed, if at all, in the Fifth Circuit only in cases involving soldiers killed in line of duty on the field of battle. (See also *Claffy* v. *Forbes,* 280 Fed. 233 (W. D. Wash., 1922)). In applying that view to the case of a civilian doctor, living in urban civilization in peacetime, we believe the decision below to be in essential conflict with *Butler* v. *Butler* and *Kell* v. *United States* (*supra*).

3. The decision of the court below is believed to be erroneous and the decisions in the *Hester* and *Lane* cases are deemed to be correct.

To support its conclusion, the court relies on two analogies: (1) cases holding that "the courts, in order to give effect to the insured's intent, will 'brush aside' a regulatory requirement [38 C. F. R., Section 8.47, Appendix A, *infra,* pp. 11-12] that 'a change of beneficiary to be effective must be made by a notice in writing signed by the insured and forwarded to the Veterans' Administration' ", and (2) "cases holding that notice to the Veterans' Administration during the lifetime of the insured, is not essential to an effective change". If these two lines of cases are correct, the court below reasons, it must follow that no weight will be given to "another regulatory requirement (§ 8.46) which purports to withhold effect to a change of beneficiary 'made by last will and testament duly probated' " (Op., p. 21, *infra*; R. 30). We submit that the reasoning is unsound.

Considering first the second line of cases, neither the District Court nor petitioner has suggested that the notice required to effectuate a change must reach the Veterans Administration during the lifetime of the insured. Indeed, the contrary conclusion is compelled by the terms of the regulation itself.* But from this it cannot follow that all forms of posthumous notice of change must be given effect even if specifically prohibited by regulation. Regulations of the Administrator under the National Service Life Insurance Act of 1940 "if consistent with the Act, have the force and effect of law and are provisions of the insurance contract binding upon" the insured and his beneficiaries (*Jones* v. *United States*, 189 F. 2d 601, 603 (C. A. 8th, 1951)). They must be enforced by the courts unless invalid; and not even the mother-respondent here has suggested that Section 8.46 is inconsistent with the Act or otherwise invalid.

As to the first line of cases, it is entirely true that "the courts brush aside all legal technicalities in order to effectuate the manifest intention of the insured" (*Roberts* v. *United States*, 157 F. 2d 906, 909 (C. A. 4th, 1946), certiorari denied 330 U. S. 829; cited in Op., p. 17, *infra*; R. 26). But this is far from saying that once the manifest intention of the insured is established, all compliance with other provisions of the regulations is obviated. The rule and its difficulties of application are well stated in *Mitchell* v. *United States*, 165 F. 2d 758, 760 (C. A. 5th, 1948), as follows:

> The cases are unanimous that in war-risk insurance cases involving change of beneficiary the courts will brush aside all legal technicalities in order to effectuate the manifest intent of the insured; and that if he manifests an intent to make a change and has done everything reasonably within his power to

* The last sentence and proviso of Section 8.47 provide in effect that a valid change when received shall be retroactively effective as of the date of execution, but that payments made between the date of death and receipt of the proper notice of change shall be deemed to have been properly made. This must contemplate giving effect to notices received after death.

> accomplish his purpose, leaving only ministerial acts to be performed by the insurer, the courts will treat that as done which ought to have been done and give effect to the insured's intent. The cases are also unanimous that a mere intent to change a beneficiary is not enough. Such an intent must be followed by some affirmative act on the part of the insured evidencing an exercise of the right to change the beneficiary. Where the courts differ is as to the degree of affirmative action necessary to effect a change. Literal compliance with the provisions of a policy is never necessary (footnotes omitted).

The court below, we submit, has erroneously confused avoidance of "literal compliance with the terms of a policy" with total disregard thereof.

As we read the applicable line of cases, the courts have not disregarded the provisions of Section 8.47 when intent is shown (any more than they have those of Section 8.46, prohibiting changes by will), but have rather adopted a liberal rule of construction in applying them to particular cases when such a liberal rule would result in effectuating the insured's intent. Thus, while the requirement that a change, to be effective, must be "made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent," has been held a valid exercise of the Veterans Administration's rule-making power, and to require at a minimum that a writing shall have been signed by the insured, the form of that writing has been held to be immaterial. *Farmakis* v. *Farmakis*, 172 F. 2d 291, 292 (C. A. D. C., 1949); *Moths* v. *United States*, 179 F. 2d 824, 827 (C. A. 7th, 1950).* Similarly, the execution of the writing may be proved by substantially less than the production of the writing itself. See, e.g., *Widney* v. *United States*, 178 F. 2d 880 (C. A. 10th, 1949). And, though the courts insist that the change

* The cases do not, of course, hold that if the writing is in a form specifically prohibited by the regulations, as is a will, it may effect a valid change.

be "forwarded" to the Veterans Administration, they have interpreted the term "forwarded" liberally to include any affirmative act by the insured "[setting] in motion the machinery devised by the United States to accomplish the desired result" (*Roberts* v. *United States,* 157 F. 2d 906, 909 (C. A. 4th, 1946), certiorari denied 330 U. S. 829). Since the terms "notice in writing" and "forwarded" are not defined, and no special forms are prescribed, these are permissible constructions of the regulations. But they are constructions; they and manifold other similar devices of construction adopted in the various circuits are means of giving effect to the insured's intent *within the framework of the regulations,* rather than in disregard of them. In holding that the regulations are to be disregarded the court below has, we submit, misunderstood and misapplied the authorities it cites, and has decided this case in essential conflict with them.

4. According to the "Statistical Summary of VA Activities" published by the Veterans Administration as of November 30, 1956, there were in force as of that date 5,419,583 policies of World War II National Service Life Insurance, with an aggregate face value of $35,513,265,000. We submit that a decision which beclouds and leaves in doubt the proper method of disposition of so vast a sum of money cannot do less than merit the supervisory attention of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

January 23, 1957.

Respectfully submitted,

CHESTER T. LANE,
HELEN L. BUTTENWIESER,
Counsel for Petitioner.

APPENDIX A

Statute and Regulations Involved

Section 602(g) of the National Service Life Insurance Act of 1940 (54 Stat. 1010, as amended by Act July 11, 1942, 56 Stat. 659, and by Act Aug. 1, 1946, Section 4, 60 Stat. 782; 38 U. S. C., Section 802(g)), reads as follows:

BENEFICIARIES

> (g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: *Provided,* That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insurance policy maturing on or after August 1, 1946.

38 C. F. R., Sections 8.46, 8.47 (1949), read in pertinent part as follows:

> § 8.46 *Beneficiary designations.* * * *
>
> A beneficiary designation shall be made by notice in writing to the Veterans' Administration signed by the insured. A beneficiary designation, but not a change of beneficiary, may be made by last will and testament duly probated. * * *
>
> § 8.47 *Beneficiary changes.* * * *
>
> A change of beneficiary to be effective must be made by notice in writing signed by the insured

and forwarded to the Veterans' Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans' Administration. Upon receipt by the Veterans' Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution: *Provided*, That any payment made before proper notice of designation or change of beneficiary has been received in the Veterans' Administration shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments.

APPENDIX B

Opinion and Judgment of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 41—October Term, 1956

(Argued October 4, 1956 Decided November 1, 1956)

Docket No. 24124

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

EVE B. PAHMER,

Defendant-Appellee,

EVA PAHMER,

Defendant-Appellant.

Before: FRANK, MEDINA and HINCKS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge,* in an action of interpleader brought by the United States, granting a motion for summary judgment in favor of defendant-appellee, Eve B. Pahmer, and denying a motion for summary judgment made by the defendant-appellant, Eva Pahmer. Reversed.

Appendix B

HAROLD W. HARRISON, Great Neck, N. Y., *for defendant-appellant.*

CHESTER T. LANE, New York, N. Y. (Beer, Richards, Lane, Haller & Buttenwieser, and Helen L. Buttenwieser, New York, N. Y., on the brief), *for defendant-appellee.*

HINCKS, *Circuit Judge:*

This is an appeal from a judgment entered in an interpleader action brought by the United States impleading, as rival claimants to the proceeds of a National Life Insurance policy issued to a World War II veteran, the veteran's widow, whose designation as beneficiary had been duly recorded in the records of the Veterans' Administration, and the veteran's mother who claimed to be the beneficiary by virtue of a writing in the form of a holographic will not brought to the attention of the Veterans' Administration until after the veteran's death. We shall hereafter refer to the claimants as the "wife" and the "mother." The facts not being in dispute, each claimant filed motion for summary judgment. The wife's motion was granted and the mother's was denied on findings and an opinion published in ..... F. Supp. ..... From the resulting judgment the mother appealed.

The underlying facts are not in dispute. They were succinctly stated in the findings of the trial judge which are set forth in the margin.[1] There was no evidence that

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[1] "The Facts

"The following facts appear to exist without substantial controversy:

"1. Marcel Pahmer, who had been in the military service, became insured under a policy of National Life Insurance, effective November 1, 1943, in the principal amount of $10,000.

the "will" quoted in finding 5, was ever admitted to probate. However, the complete instrument, which concededly

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"2. The insured named his wife Eve B. Pahmer as beneficiary, and his minor son John as contingent beneficiary.

"3. Several years prior to his death, the insured and his wife had become estranged and had separated. In 1950, the insured moved to Florida and there commenced a divorce proceeding against his wife. After hearings, a Referee found adversely to the insured. The Referee's findings were the subject of motions pending at the time of insured's decease.

"4. During the night of February 10, 1951, the insured took his life by poison in his mother's apartment in New York City.

"5. Found with the insured's body was a sealed envelope with the inscription: 'My last will and testament—to be opened only by my mother.' Inside the envelope was a four-page handwritten statement which read, in part, as follows:

'This is my last will

Febr. 10, 1951

'I, undersigned, Marcel Pahmer, sound of body and mind, hereby declare the following to be my last will: and irrevocably request it be followed in its entirety:

'1. I leave to my mother, Eva Pahmer, 28 E. 95th Str. N. Y. C. and bequeath upon her the totality of my belongings for her to dispose at her will.

'2. In case my Life Insurance is payed off after my death, the totality of it is to go to my mother, above named, for her to own and dispose of at her will, after collecting it in full.

'3. In case a portion is set aside automatically by law to my hated ex-wife, she is not to use it under any pretext or cause, but to set it aside exclusively for my son, Johnny Pahmer, now aged 11 y.

'4. Whatever, in case this is so, my hated ex-wife, whom I have divorced purposely and irrevocably, is able to extort from my Life Insurance is not to be destined to her, but to be put in escrow and set aside for the use of my son, Johnny Pahmer, when and not before his 18th birthday.

* * *

'10. I also instruct my mother to prepare a "dossier" concerning the beastly doings and writings of my hated ex-wife, by means of the papers she will find, so that she (my mother) or her successors will show to my son when he reaches the age of 18 y. who killed his father and what monster bore him to life.'"

was wholly in the insured's handwriting, is reproduced in the wife's appendix and shows that although signed by the insured it was not attested by any subscribing witnesses. In his opinion, the trial judge commented on "the fact that the instrument was not executed with testamentary formalities and, therefore, was not admissible to probate." Neither party contested this conclusion. We have no contrary view but consider the eligibility of the instrument to probate to be a question not necessary to decide.

The Regulations of the Veterans' Administration contain the following provisions:

> "§ 8.46 *Beneficiary designations.*
>
> * * *
>
> "A beneficiary designation shall be made by notice in writing to the Veterans' Administration signed by the insured. A beneficiary designation, but not a change of beneficiary, may be made by last will and testament duly probated."
>
> * * *
>
> "§ 8.47 *Beneficiary changes.* The insured shall have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary to cancel the beneficiary designation, or to change the beneficiary, * * *. A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans' Administration. Upon receipt by the Veterans' Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution: *Provided*, That any payment made before proper notice of designation or change of beneficiary has been received in the Veterans' Administration shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments."

Concededly, in the case before us the substitution of the mother as the insured's beneficiary did not fully comply with these regulations. But in the field of National Life Insurance the cases are legion which hold that in judging of the efficacy of an attempted change of beneficiary "the courts brush aside all legal technicalities in order to effectuate the manifest intention of the insured." *Roberts* v. *United States,* 4 Cir., 157 F. 2d 906, cert. den. 330 U. S. 829. This case may be cited as typical of this long, unbroken, line of authority. Thus it is abundantly established that a change of beneficiary may be shown by proof of intent to make the change coupled with "positive action on the part of the insured evidencing an exercise of the right to change the beneficiary." *Collins* v. *United States et al.,* 10 Cir., 161 F. 2d 64, 67, cert. den. 331 U. S. 859. In this case it was stated that the requirement of "positive action" is satisfied if "the insured did everything that was necessary on his part to evidence a change in the beneficiary." In *Roberts* v. *United States, supra,* at 909, it was said that the requirement of positive action was satisfied if the insured "has done everything reasonably within his power to accomplish his purpose, leaving only ministerial acts to be performed by the insured." To the same effect is *Mitchell* v. *United States,* 5 Cir., 165 F. 2d 758. In *Shapiro* v. *United States et al.,* 166 F. 2d 240, cert. den. 334 U. S. 859, this court indicated concurrence with these cases. In *McCollum* v. *Sieben,* 8 Cir., 211 F. 2d 708, 712, it was said that the requirement of positive action was satified if the insured, "before his death, * * * had done all that could reasonably have been expected of him to bring about the change." In *Senato* v. *United States,* 173 F. 2d 493, 495, this court said that the action taken to carry out his intent was enough "so long as he might reasonably be supposed to have thought it enough."

In the case before us we think it plain that the insured's "will," even if not a writing entitled to probate as a will, required a finding that he intended to substitute his mother for his wife as the beneficiary of his insurance. His direction that "In case my Life Insurance is payed [sic] off after my death, the totality of it is to go to my mother," is not in conflict with any evidence of a contrary intent and unequivocally states his intent that his mother shall be the beneficiary. There is no evidence to show, and the parties do not suggest, that there was outstanding life insurance other than the policy of National Life Insurance involved herein.

Somewhat closer is the question whether the proofs of positive action to effectuate the change, were sufficient. It is argued that the change was ineffective because there was no action taken to accomplish the intended change *in the lifetime* of the insured: that the only positive action taken was to write a document which was plainly intended as a will and as such not intended to take effect until his death. We think, however, that the suggested distinction between a change of beneficiary accomplished during the insured's lifetime and a change to become effective upon his death is of no significance, at least for present purposes. For a change, even if accomplished in his lifetime, would not have been operative until his death. At any time thereafter the insured would have had power to make another change. To say that "X, a substituted beneficiary, shall receive the insurance on my death" is in legal effect the same as to say that "X is hereby designated as my substituted beneficiary." We hold, therefore, that here the intent to substitute the mother as the beneficiary was not ineffective because accompanied by an expression of intent that the change should not take effect until the death of the insured.

It remains to consider whether the intended change was sufficiently evidenced by a positive action. The intent was

plainly expressed in a writing dated February 10, 1951, signed by the insured and sealed in an envelope endorsed "To be opened only by my mother," who was the intended substituted beneficiary. This envelope was found by the body of the insured upon the discovery, on February 11, 1951, of his suicide in an apartment which he then shared with his mother. We hold that his action in signing a plain statement of his intended change of beneficiary and disposing of the writing in such a way that, as he might reasonably have expected, it would come into his mother's possession immediately upon the discovery of his suicide, was enough to accomplish the intended change. *Egleston* v. *United States,* 71 F. Supp. 114, aff'd 7 Cir., 168 F. 2d 67; *Collins* v. *United States, supra; Lincoln Bank & Trust Co.* v. *United States,* 71 F. Supp. 745.

Upon receipt of properly substantiated notice of the writing, the Veterans' Administration became obligated to pay over to the mother so much of the proceeds of the insurance as was still in its hands. *Collins* v. *United States, supra; Roberts* v. *United States, supra; Egleston* v. *United States, supra; Zabor* v. *United States,* 113 F. Supp. 287, aff'd 2 Cir., 212 F. 2d 440. The fact that such notice was not received until after the death of the insured, is immaterial. *Widney* v. *United States,* 10 Cir., 178 F. 2d 880; *McKewen* v. *McKewen,* 5 Cir., 165 F. 2d 761, cert. den. 334 U. S. 860; *Collins* v. *United States, supra; Coleman* v. *United States,* D. C. Cir., 176 F. 2d 469. In the *Coleman* case, the wife, who claimed as a substituted beneficiary, relied on a writing by the insured which stated "On date of Oct. 1, 1943, I took out $10,000 in (National Service Life Insurance) (United States Insurance) naming you as my beneficiary." This statement was not true: in fact, the insured, when he took out the insurance, named his mother as beneficiary. Moreover, there was other evidence of an intent that his mother, and not his wife, should take. We

think it due to these factors that the trial court was sustained in holding that no change in its original designation was accomplished. In *Butler* v. *Butler,* 5 Cir., 177 F. 2d 471, it was held that the proof *of intent* to make a change was not sufficiently proved. Here, we find the intent abundantly established. To the extent that *Butler* holds that the substitution of beneficiary failed because the insured failed to give written notice of the change to the Veterans' Administration, we think the holding in conflict with the great weight of authority as exemplified by the cases cited earlier in this opinion.

The wife relies heavily on *Hester* v. *Hester,* 5 Cir., 171 F. 2d 477, in which the insured had instructed his brother by letter to hold his written designation of substituted beneficiaries "in your box as they are for use in case of misfortune to me, as later might want to change them in some way * * *." Id. at 478. The court held the substitution ineffective because by his letter the insured "kept a tight and effective control on the letters to the Veterans Administration and thereby prevented the intent to give, which he had given expression to from becoming effective in his lifetime." In the instant case, however, the insured did not keep control of his "will": by his contemporaneous suicide he negated an intent to hold the document for another change of beneficiary and thus in effect accomplished a prompt and irrevocable surrender of control. And even if this be not deemed a valid distinction, we could not here apply the *Hester* holding. For, with deference, we think it immaterial that the *Hester* insured prevented his indicated change "from becoming effective in his lifetime." Even if he had sent his designation of substituted beneficiaries direct to the Veterans' Administration, it would not have become operative until his death, as we observed above.

Appendix B

It is argued in behalf of the wife: "If a duly probated will cannot effect a change of beneficiary [because of Regulations § 8.47], the result can scarcely be different with a dispositive document purporting to be a will merely because the testator was unfamiliar with the forms of the law governing the validity of wills." The argument is fallacious: its premise is unsound. If the courts, in order to give effect to the insured's intent, will "brush aside" a regulatory requirement that "a change of beneficiary to be effective must be made by a notice in writing signed by the insured and forwarded to the Veterans' Administration," they will similarly treat another regulatory requirement (§ 8.46) which purports to withhold effect to a change of beneficiary "made by last will and testament duly probated." Dicta to the contrary in *Hester* v. *Hester, supra,* and the holding in *Lane* v. *United States,* 116 F. Supp. 606, we think in flat conflict with the basic principle which underlies the multitude of cases holding that notice to the Veterans' Administration during the lifetime of the insured, is not essential to an effective change. We agree with the holding on this point in *Woods* v. *United States,* M. D. Ala., 69 F. Supp. 760, at 763. See also *Zabor* v. *United States, supra.*

The proviso to Regulation § 8.47, quoted above, furnishes the United States with all needed protection against a belated notice of a substitution of beneficiary whether the designation be embodied in a probated will or in a nontestamentary writing. The protection thus afforded was not invoked by the United States in this case either by pleading or by way of opposition to the respective motions for summary judgment. Indeed, the United States disclaimed any interest in the outcome. Obviously, the reason was that no payment of the insurance proceeds had been made to the wife before the claim of the mother had been received. Consquently the situation here does not require strict enforcement of either of the cited regulations as to any part of the proceeds. *Woods* v. *United States, supra.*

Reversed.

Judgment of Reversal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of November one thousand nine hundred and fifty-six.

Present:

HON. JEROME N. FRANK,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

—o—

UNITED STATES OF AMERICA
Plaintiff-Respondent

v.

EVE B. PAHMER
Defendant-Appellee

EVA PAHMER
Defendant-Appellant

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. DANIEL FUSARO
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 712

EVE B. PAHMER, PETITIONER

v.

UNITED STATES OF AMERICA and EVA PAHMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case involves a contest as to the disposition of the proceeds payable by the Government under a National Service Life Insurance policy issued to Marcel Pahmer who committed suicide on February 10, 1951. The insured was in the process of obtaining a divorce from petitioner Eve B. Pahmer at the time of his death but she remained as beneficiary of record in the files of the Veterans Administration. Eva Pahmer is the insured's mother and, in a last note entitled "This Is My Last Will", the insured designated her as his new beneficiary. The note was forwarded to the Veterans Administration before any payments were made to Eve B. Pahmer, and subsequently both his mother and ex-wife made claim for the proceeds of the insurance, the

mother claiming that the redesignation embodied in the last letter was effective to make her the beneficiary.

The United States instituted this action in the United States District Court for the Southern District of New York, admitting liability under the NSLI policy but interpleading the mother and ex-wife because of the conflicting claims, and further asking the court to determine whether the mother or the ex-wife was entitled to benefits under the policy. On cross-motions for summary judgment by the two defendants, the court found for the ex-wife, and the mother appealed to the Court of Appeals for the Second Circuit. The Court of Appeals reversed. The opinion, entered on November 1, 1956, is reported at 238 F. 2d 431.

The petition for a writ of certiorari was filed on January 25, 1957, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The United States is involved in this proceeding only as a stakeholder, and its only interest in this controversy is to see to it that the proceeds of the insurance admittedly due are paid to the proper beneficiary. The United States filed no brief and presented no argument in the District Court or the Court of Appeals, and, although it desires to reserve the right to file a brief and to take part in argument should the petition be granted, it takes no position on the merits of the petition for a writ of certiorari and waives any right it may have to file a brief opposing that petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1957.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 712

EVE B. PAHMER,

Petitioner,

—v.—

UNITED STATES OF AMERICA
and EVA PAHMER,

Respondents.

BRIEF FOR EVA PAHMER IN OPPOSITION

HAROLD WM. HARRISON
Counsel for Respondent,
Eva Pahmer

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IN THE

Supreme Court of the United States

October Term, 1956

No. 712

EVE B. PAHMER,

Petitioner,

—v.—

UNITED STATES OF AMERICA
and EVA PAHMER,

Respondents.

BRIEF FOR EVA PAHMER IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 13a-20a) is reported in 136 F. Supp. 762. The opinion of the Court of Appeals (printed in Appendix B to the Petition, pp. 13-21; also R. 22-31) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on November 1, 1956 (R. 32-33). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether a valid change of beneficiary, as against the claim of a former beneficiary, has been effected by a holder of a National Service Life Insurance policy where the holder writes and signs an instrument, in the form of an

unprobatable holographic will, re-designating his mother as beneficiary, leaves the same in an envelope with directions that it be opened only by her, and where the written instrument, among other respects, directs her to deliver the same to its destination, in the absence of further compliance with the appropriate National Service Life Insurance Regulations, the deceased thereupon contemporaneously taking his life.

Statute and Regulations Involved

The statutory provision involved in Section 602(g) of the National Service Life Insurance Act of 1940 (54 Stat. 1010, as amended by Act of July 11, 1942, 56 Stat. 659, and by Act of August 1, 1946, Section 4, 60 Stat. 782; 38 U. S. C., Section 802(g)). The regulations involved are 38 C. F. R., Sections 8.46, 8.47 (1949). The pertinent parts of the statute and regulations are set forth in Appendix A to the Petition, pages 11-12.

Statement

The United States of America, as the stakeholder of Ten Thousand Dollars ($10,000.00), representing the proceeds of a policy of National Service Life Insurance, instituted this action in the nature of an interpleader, pursuant to the provisions of the National Service Life Insurance Act of 1946 (Title 38, Section 817 U. S. C. A.), conceding therein its liability to pay the sum of $10,000.00 pursuant to the terms of the National Service Life Insurance Contract of insurance issued to the late Marcel Pahmer, formerly an officer in the armed forces of the United States.

Upon a motion and cross-motion for summary judgment, the following facts were conceded by the parties:

For several years prior to the death of the deceased on about February 10, 1951, the deceased and his wife had been estranged and separated and living apart from each other. Several months prior to his death, the deceased established, or attempted to establish, a residence in the State of Florida and commenced an action for divorce against his wife. This action was contested by his wife and testimony was heard by a Referee or Special Master, who made findings of fact adverse to the deceased. At the time of the deceased's death, motions were pending respecting the confirmation of the Referee's report. Early in 1951, the deceased returned to New York to an apartment shared by his mother, Eva Pahmer, and on the morning of February 11, 1951, at that apartment, the deceased's body was found by his mother, the deceased having committed suicide by having taken poison. At or about the time of the removal of the body of the deceased by the Chief Medical Examiner of the City of New York, said Chief Medical Examiner took into his custody and possession an instrument entitled "This is my last will." As so taken over by the Chief Medical Examiner this instrument was contained in a sealed envelope which bore on its face a handwritten inscription: "My last will and Testament—To be opened only by my mother" (R. 103).

The following language is excerpted from this document dated February 10, 1951:

> "1. I leave to my mother, Eva Pahmer, 28 E. 95th Str, N.Y.C. and bequeath upon her the totality of my belongings for her to dispose at her will.
>
> "2. In case my Life Insurance is payed off after my death, the totality of it is to go to my mother, above named, for her to own and dispose of at her will, after collecting it in full.

"3. In case a portion is set aside automatically by law to my hated ex-wife, she is not to use it under any pretext or cause, but to set it aside exclusively for my son, Johnny Pahmer, now aged 11 y.

"4. Whatever, in case this is so, my hated-ex-wife, whom I have divorced purposely and irrevocably, is able to extort from my Life Insurance is not to be destined to her, but to be put in escrow and set aside for the use of my son, Johnny Pahmer, when and not before his 18th birthday. . . .

(Instrument goes on to describe disposition in respect to son.)

* * * * *

"9. I instruct hereby my mother to make sure that each and every one of the last notes I have left behind me shall be delivered to its destination, which includes Jenny Kozinsky (?), now MRS. PETER DEAN, my hated-ex-wife, my son.

"10. I also instruct my mother to prepare a 'dossier' concerning the beastly doings and writings of my hated ex-wife, by means of the papers she will find, so that she (my mother) or her successors will show to my son when he reaches the age of 18 y. who killed his father and what monster bore him to life" (R. 104).

The above instrument was signed by the deceased and there is no issue as to the fact that both it and the inscription on the enclosing envelope were in their entirety in his handwriting. There is also no issue as to the deceased's having had any other policy of life insurance and no other policy is known to exist.

The instrument entitled "This is my last will," dated February 10, 1951, together with the envelope in which

it was contained, are concededly in the handwriting of the deceased and were concededly taken into the custody of the Chief Medical Examiner of the City of New York at the time of the removal of the deceased's body.

The District Court held that the document, even though unprobated and unprobatable, did not express an intent to make a present change of beneficiary and that, in any event, it was ineffective under the Regulations of the Veterans Administration (38 C. F. R., Section 8.46; Appendix A to the Petition, p. 11).

The Court of Appeals reversed, holding that the acts of the insured, in changing his beneficiary, in writing, and contemporaneously taking his life, were sufficient to accomplish the intended change of beneficiary. (Op., p. 19, Petition, R. 28; Op., p. 21, Petition, R. 30.)

Argument

1. The Court of Appeals held that the insured, by executing and signing the document in question, and by leaving it in an envelope addressed to his mother with directions that it "be delivered to its destination" (R. 103), and by contemporaneously taking his life, successfully redesignated his mother as the beneficiary of the proceeds of this policy of insurance.

The Petitioner concedes (Petition, p. 8) that " 'the courts brush aside all legal technicalities in order to effectuate the manifest intention of the insured' " (*Roberts* v. *United States,* 157 F. 2d 906, 909 (C. A. 4th, 1946), certiorari denied 330 U. S. 829; cited in Op., p. 17, R. 26) and quotes as "well stated" the language of *Mitchell* v. *United States,* 165 F. 2d 758, 760 (C. A. 5th, 1948) to the effect that

> "the courts will treat that as done which ought to have been done and give effect to the insured's intent. The

> cases are also unanimous that a mere intent to change a beneficiary is not enough. Such an intent must be followed by some affirmative act on the part of the insured evidencing an exercise of the right to change the beneficiary."

(See also: *Collins* v. *United States et al.*, 10 Cir., 161 F. 2d 64; *Shapiro* v. *United States et al.*, 166 F. 2d 240, cert. den. 334 U. S. 859; *McCollum* v. *Sieben*, 8 Cir., 211 F. 2d 708; *Senato* v. *United States*, 173 F. 2d 493; *Moths* v. *United States* (C. A. Ind. 1950), 179 F. 2d 824; *Steele* v. *Suwalski* (C. C. A. Wis. 1935), 75 F. 2d 885; *Kaschefsky* v. *Kaschefsky* (C. C. A. Mich. 1940), 110 F. 2d 836; *Sights* v. *United States* (D. C. D. C. 1950), 89 F. Supp. 235; *Kendig* v. *Kendig* (C. A. Ariz. 1948), 170 F. 2d 750; *Coleman* v. *United States*, 176 F. 2d 469, 85 U. S. App. 145; *Widney* v. *United States* (C. A. Okla. 1950), 178 F. 2d 880.) (See also *Johnson* v. *White*, 39 F. 2d 793 and *Schroeder* v. *United States*, 24 F. 2d 420.)

Petitioner further concedes and admits that she has not even suggested that it is required that any notice effectuating a change must reach the Veterans Administration during the lifetime of the insured (Petition, p. 8). (See also: *Collins* v. *United States, supra; Roberts* v. *United States, supra; Egleston* v. *United States*, 71 F. Supp. 114, aff'd 7 Cir., 168 F. 2d 67; *Zabor* v. *United States*, 113 F. Supp. 287, aff'd 2 Cir., 212 F. 2d 440; *Widney* v. *United States, supra; McKewen* v. *McKewen*, 5 Cir., 165 F. 2d 761, cert. den. 334 U. S. 860; *Coleman* v. *United States, supra.*)

The Petitioner's quarrel with the opinion of the court below is predicated mainly upon the argument that the deceased, in this case, did nothing more than evidence an intent to change his beneficiary but performed no act "evi-

dencing an exercise of the right to change the beneficiary." (See *Mitchell* v. *United States, supra.*) In this respect, Petitioner likens the facts at bar to those in *Hester* v. *Hester* (5 Cir., 171 F. 2d, 477), whereas, as pointed out in the opinion of the court below, in *Hester* the deceased instructed his brother to hold a re-designation "in your box as they are for use in case of misfortune to me, as later might want to change them in some way . . . " (Id. at 478). In the instant case, as pointed out by the court below, the deceased by his contemporaneous suicide negated any intent to hold the document for any further re-consideration and thus accomplished a prompt and irrevocable surrender of control.

It is well settled and apparently conceded by Petitioner that if this deceased had, immediately before taking his life, mailed the very document in question to the Veterans Administration or to some other person with instructions that it be so relayed, that the deceased would clearly have done enough to accomplish a re-designation (Petition, p. 8, p. 10). Petitioner's only argument appears to be that the same re-designation, written under the same circumstances, followed by immediate suicide, but left to be found rather than mailed, defeated this result.

It appears clear that the deceased not only evidenced his intent to change his beneficiary, but sufficiently carried out such intent by reducing it to writing and by so placing it in the envelope addressed to and to be opened by his mother, with appropriate directions, and by irrevocably punctuating such intent and giving it a present and irrevocable expression, by contemporaneously taking his life.

2. Although it was perhaps unnecessary to the opinion below, the Court properly held that under the plethora of cases in the field of National Service Life Insurance, where regulations are brushed aside (Op., p. 17), there is no

reason or authority for applying any regulation against change by will and testament, particularly where the same, although in the form of a will, is admittedly unprobatable.

The Court properly held that Regulation Section 8.47 furnishes the United States with all needed protection in cases where it has paid out as against a belated notice of substitution. Inasmuch as, in this case, the United States, acting as an uninterested stakeholder, had not and could not invoke any of the protection thus afforded, and disclaimed any interest in the outcome, the situation does not require enforcement of the Regulations as to any part of the proceeds. (Op., p. 21.) (See *Woods* v. *United States*, 69 F. Supp. 760.) Indeed, the Court might well have stated the proposition in stronger language, namely, that the Regulations serve only to protect the Government's interests and cannot be raised by anyone other than the Government. It cannot be said that these Regulations were promulgated in order to protect any beneficiary as against any re-designated beneficiary but only to protect the Government where it has made payment in reliance upon the Regulations. (See *Collins* v. *United States, supra.*)

It might be said in passing that of the hundreds and perhaps thousands of cases involving changes of beneficiary in which the change has been upheld, there has never been a compliance with the Regulations, inasmuch as had the Regulations been complied with, litigation would have been pointless. As was stated in *United States* v. *Mallery*, 48 F. 2d 6:

> "Form, formality and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and when the purpose of the law has been complied with, there should be no hesitancy in carrying out the express wishes of such deceased."

3. Although Petitioner sees a conflict between the Circuits, particularly as to *Hester* v. *Hester, supra,* the court below properly held that the facts relied upon in *Hester* v. *Hester,* as stated above, and as set forth in its opinion (p. 20), were entirely different and that, at best, the expression in the *Hester* case, at the foot thereof, was unnecessary to its result and mere dicta. In this respect, the observation of the court below that, under any circumstances, it could not apply the *Hester* holding to this case, was likewise dicta. As the Court succinctly stated, in reviewing the Regulations and the numerous cases, the basic question before the Court was merely one of whether the intended change of beneficiary was sufficiently evidenced by positive action. (Op., p. 18.) In this respect there is no difference of opinion as between the Circuits, and the court below, in finding that the acts of the insured were sufficiently positive to accomplish the intended change, is buttressed by abundant authority. (*Egleston* v. *United States, supra; Collins* v. *United States, supra; Lincoln Bank & Trust Co.* v. *United States,* 71 F. Supp. 745.)

CONCLUSION

The decision of the court below is correct. No question of importance is presented, and the peculiar facts of the case at bar are not likely to be repeated. There is no conflict among the cases. It is therefore respectfully submitted that the Petition for a writ of certiorari should be denied.

February 14, 1957.

Respectfully submitted,

HAROLD WM. HARRISON
Counsel for Respondent,
Eva Pahmer